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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 510

WILSON MILLING COMPANY, A DISSOLVED CORPORATION, BY A. J. LANDRUM, R. E. LEE WILSON, JR., J. H. CRAIN, S. A. REGENOLD AND W. F. WILSON, TRUSTEES IN LIQUIDATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 13–20) is reported at 1 T. C. 389. The opinion of the Circuit Court of Appeals (R. 30–34) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 18, 1943 (R. 35). The petition for a writ of certiorari was filed on November 26, 1943. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1935 the taxpayer purchased flour at prices which included the processing tax imposed under the Agricultural Adjustment Act and resold the flour at prices which similarly included the tax. In 1937 it received reimbursements from two of its vendors representing amounts of the tax burden which had been passed on to it and which it had in turn passed on. Is the amount of these reimbursements subject, for the year 1937, to the unjust enrichment tax imposed by Section 501 of the Revenue Act of 1936?

STATUTE INVOLVED

The statute involved is set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The taxpayer is an Arkansas corporation, organized on August 7, 1930, to engage in the wheat and corn milling business. It was dissolved on May 2, 1938, and its directors are its trustees in liquidation. (R. 14.)

The taxpayer discontinued the milling of wheat in 1934 and thereafter bought flour on the open market from other milling companies and sold it to retail grocers. During 1937 it received the

amount of $3,794.92 as reimbursements from two of its vendors on flour purchased in 1935. The reimbursements were made with respect to flour delivered under contracts known as "Miller's National Federation Uniform Sales Contract (Adopted July 10, 1934)." (R. 14.) These contracts called for the delivery of a specified number of barrels of flour at a specified price per barrel, and contained a clause reading in part as follows (R. 14):

> Taxes: The price named in this contract includes all taxes as at the date hereof proclaimed by the Secretary of Agriculture by virtue of the authority vested in him by the Agricultural Adjustment Act of the United States. * * * if any tax included in the price hereof shall be decreased or abated, then, in that event, said decrease or abatement shall be deducted from the price hereof.

No separate charge was made by the vendors for processing tax, but the price per barrel was sufficient to include the processing tax on wheat. This flour the taxpayer sold at a specified price per barrel, using as the cost price to determine its sale price, the price paid by it to its vendors. No separate charge was made to its vendees for the processing tax. (R. 15.)

The taxpayer did not receive enough from the sale of its products to cover its cost and expenses of operating. It reported net losses on its income

tax returns for the years 1935, 1936 and 1937 in the respective amounts of $11,436.81, $4,554.40 and $8,677.06. (R. 15.)

The Commissioner determined that the taxpayer was subject, under Title III of the Revenue Act of 1936, to an unjust enrichment tax equal to 80% of the reimbursements (R. 15). The Tax Court affirmed the Commissioner's determination (R. 21) and its decision was in turn affirmed by the Circuit Court of Appeals (R. 35).

ARGUMENT

Introductory.—Titles III and VII of the Revenue Act of 1936 were enacted in response to the decisions in *United States* v. *Butler,* 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110, holding invalid the processing taxes imposed by the Agricultural Adjustment Act of 1935, c. 25, 48 Stat. 31, as amended by the Act of August 24, 1935, c. 641, 49 Stat. 750. Title VII conditioned the refund of processing taxes which had been paid to the Government upon a showing by the claimant that he had not shifted the burden of the tax "directly or indirectly." Section 902 (a). See *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. Title III was directed at reaching the unjust enrichment resulting from the invalidation of the processing taxes in cases where the taxes had not been paid to the Government, or where, if paid, refunds had already been made. By Section 501 a tax of 80% was levied on the net unjust enrich-

ment or "windfall" income. Clause (1) of Section 501 (a) reached processors who had passed on the burden of the tax but had not remitted to the Government. Clause (2) reached cases, such as the instant one, where a purchaser of a taxed commodity had in turn passed on the burden of the tax and had then received reimbursements from his vendor. Clause (3) reached cases where the processing tax had been paid to the Government, but had been refunded. Section 501 (1) provided that the tax was to be imposed on the net income from these sources regardless of losses from other transactions, and Section 502 avoided double taxation by granting as a credit against the tax the amount of other federal income and excess profits taxes payable on that income. As both the Tax Court and the Circuit Court of Appeals have held, the reimbursements of $3,794.92 which the taxpayer received in 1937 fell squarely within the terms of the statute.

1. There is but a vague relationship between the instant case on the one hand and *Security Flour Mills Co.* v. *Commissioner,* No. 276, present Term, and *Helvering* v. *Cannon Valley Milling Co.,* 129 F. 2d 642 (C. C. A. 8th), on the other hand. In those cases processors made reimbursements to their vendees in years after 1935 and sought to deduct, as business expenses, the amounts of those reimbursements from their incomes for 1935, the year in which they had made the sales

with respect to which the reimbursements were made, rather than from their incomes of the later years. Those cases turn upon a specific statutory provision (Sec. 43 of Title I of the Revenue Acts of 1934,[1] 1936,[2] and 1938[3]), which deals only with the time when deductions and credits shall be taken.[4] The instant case presents no question under Section 43. It does not even present any real issue as to the time when an item of income is to be reported. For even if it should be assumed that the taxpayer was on the accrual basis of accounting, there is nothing in the record to support any suggestion that a right to the reimbursements had accrued at any time prior to 1937. It is not shown and it cannot be assumed that the taxpayer's vendors had agreed prior to that time to make the reimbursements. Processors frequently took the position [in which they were sustained; see *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. 2d 366 (C. C. A. 10th); *Johnson* v. *Igleheart Bros.*, 95 F. 2d 4 (C. C. A. 7th), certiorari denied, 304 U. S. 585]

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[1] C. 277, 48 Stat. 680.

[2] C. 690, 49 Stat. 1648.

[3] C. 289, 52 Stat. 447.

[4] *Commissioner* v. *Blaine, Mackay, Lee Co.*, now pending in the Third Circuit, on review of Memorandum Decisions of January 17, 1942, of the Board of Tax Appeals (1942 P-H Memorandum Decisions, pars. 42,022, 42,032), also raises that issue, namely the proper time for deduction of reimbursements to vendees and of attorneys' fees paid in a suit attacking the validity of the processing taxes.

that the tax clause of the Miller's Federation Contract (R. 14) imposed no liability upon them to make such payments. The record does not show that there was here anything more than the usual decision to pay the vendee's claim; nor does it show that any agreement to make the payments was reached prior to 1937.[5] The courts below were therefore plainly correct under long settled principles (see *North American Oil* v. *Burnet*, 286 U. S. 417) in holding that the reimbursements were properly to be reported in that year.[6] Neither *Spring City Co.* v. *Commissioner*, 292 U. S. 182, nor *Schoellkopf Aniline & Chemical Works* v. *United States*, 77 Ct. Cls. 529, nor I. T. 3064, 1937–1 Cum. Bull. 94, is to the contrary. They all hold that an item does not become in-

[5] There is certainly nothing in the case to suggest that the reimbursements were gratuities. Cf. *Helvering* v. *Amer. Dental Co.*, 318 U. S. 322. Petitioner's assertion that the reimbursements were necessarily either gifts or made pursuant to a fixed and definite right under the Miller's Federation Contract is patently fallacious. It cannot be assumed that there was an absence of the usual controversy leading to negotiations resulting in a definite settlement.

[6] Since under any view the reimbursements were income of 1937, it was doubtless for this reason that the Circuit Court found it unnecessary to consider the new issue, tendered there at the eleventh hour, as to whether the taxpayer filed its return for that year on the cash or accrual basis of accounting. Moreover it is to be observed that the evidence relied upon by the taxpayer (Pet. 12–13) to show that the accrual system was used is self-contradictory and hardly supports that conclusion.

come to a taxpayer on the accrual basis until the right thereto has become fixed.

2. There is no merit to the suggestion that the opinion of the Circuit Court is in conflict with its own decision in *Helvering* v. *A. L. Killian Co.*, 128 F. 2d 433; see also *Hirsch* v. *Commissioner*, 115 F. 2d 656 (C. C. A. 7th). Those cases hold simply that where there is a reduction in the purchase price of property before the vendee has finished paying for it, the amount by which the obligation has been reduced does not constitute income to the purchaser, but is only a revision of the original price. Here, however, the goods had already been bought, paid for and resold; the money turned over to the taxpayer by its vendors in the year 1937 could hardly be viewed as other than income in that year. See *Sportwear Hosiery Mills* v. *Commissioner*, 129 F. 2d 376 (C. C. A. 3d).

3. The suggestion that Title III of the Revenue Act of 1936 is unconstitutional ignores more than a quarter of a century of history. The term "net income" taxed by the statutes has never been the net gain or profit of the taxpayer in the economic sense; it has always been simply the difference between "gross income" as statutorily defined, and the deductions as statutorily limited. From the beginning some items which might properly have been included in gross income have been excluded therefrom, and from the beginning the items of

deduction have never attempted nor purported to include all of those which in the economic sense should be subtracted in order to arrive at net gain. It has long been a normal feature of the income tax that a taxpayer might sustain a net loss in the accounting or economic sense, but nevertheless have a net income subject to tax. Familiar and everyday examples are those arising from the limitation upon the allowance of capital losses as deductions. It is clear that there is no constitutional requirement that Congress allow a taxpayer to deduct other losses from his unjust enrichment net income.

The constitutionality of the unjust enrichment tax has been sustained in *White Packing Co.* v. *Robertson,* 89 F. 2d 775 (C. C. A. 4th); *Kingan & Co.* v. *Smith,* 17 F. Supp. 217 (S. D. Ind.); *Louisville Provision Co.* v. *Glenn,* 18 F. Supp. 423 (W. D. Ky.), appeal dismissed, 90 F. 2d 1012 (C. C. A. 6th); and *Union Packing Co.* v. *Rogan,* 17 F. Supp. 934 (S. D. Cal.). And *United States* v. *Hudson,* 299 U. S. 498, seems to have put to rest any question concerning the power of Congress to levy a special tax upon income arising from a particular source.

CONCLUSION

The decision below is plainly correct and is not in conflict with any other decision. There is no occasion for further review and the petition should be denied.

Respectfully submitted.

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DECEMBER, 1943